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SUMMARY RECORD OF THE 588th MEETING

Held at Headquarters, New York,
on Thursday, 30 May 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 3.15 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 12 (continued)

1. Mr. PHUA (Singapore) said that a new version of article 12 of the draft Model Law had been produced immediately before the meeting by an informal working group in response to the comments made at the previous meeting. If the proposed changes were adopted, paragraph 1 of that article would then read: "Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged." Paragraph 2 would read: "Where the originator has not requested or agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, the request for an acknowledgement may be satisfied by (a) any communication by the addressee, automated or otherwise, or (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received."

2. Paragraphs 3 and 4 would remain unchanged. Paragraph 5 would read: "Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. This presumption does not imply that the data message sent corresponds to the message received."

3. Paragraph 6 would read: "Where the received acknowledgement states that the related data message met technical requirements either agreed upon or set forth in applicable standards, such as those verifying the integrity of its contents, it is presumed that those requirements have been met."

4. Paragraph 7 would read: "Apart from establishing receipt of the data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt."

5. Mr. GRIFFITH (Australia) said that the second sentence of paragraph 5 was unnecessary, and somewhat inconsistent with the terms of article 11, paragraph 4.

6. Mr. SORIEUL (International Trade Law Branch) noted that the new paragraph 2 attempted to deal both with situations in which the originator of the message had requested acknowledgement of receipt and with situations where the parties had agreed that such acknowledgements should be provided as a matter of course. He wondered whether it was logical or feasible to provide for both types of situation in a single formula; the new wording did not seem to take into account the considerable difference between a situation where the addressee failed to acknowledge receipt in the manner requested by the originator, and one where the parties had agreed in advance that such acknowledgement should be provided in a particular manner.

7. Mr. FERRARI (Italy) said that in cases where the acknowledgement of receipt was not given in the form requested by the originator, it would be considered that no acknowledgement of receipt had been given.

8. Ms. BOSS (United States of America), responding to the remarks by the representative of the secretariat, said that the result should be the same whether acknowledgement was requested in a particular form or whether there was an agreement that it should be in a particular form. Taken in context, the new wording did make sense.

9. Mr. ZHANG Yuqing (China) said that his delegation had some difficulties with the attempt to cover the two different situations in a single paragraph. The practical application of the law would be facilitated if the text could be made more clear, preferably with concrete examples.

10. Mr. ABASCAL (Mexico) said that where an agreement between the parties existed it would apply, and the attempt to cover that situation in article 12 was an unnecessary source of confusion. Also, the new draft still gave the originator the right to determine unilaterally the form in which acknowledgement of receipt was to be given. If that solution was adopted, he hoped that the reasons for it would be expressed clearly so that in the future, those who had to apply the law would be able to understand them.

11. Mr. CHOUKRI (Observer for Morocco) agreed with the representative of the secretariat that the draft should not have attempted to provide for the two different situations in a single paragraph. Article 12 should provide only for the situation where acknowledgement was requested in a particular form.

12. Mr. ANDERSEN (Observer for Denmark) said that where no prior agreement existed, it was logical that the originator of the message, who would usually be the party making an offer, should be empowered to determine whatever conditions he wished. Where a prior agreement existed, the form of the acknowledgement would in any case be determined by that agreement.

13. In order to avoid spending too much time on further discussions of the wording of article 12, it would be useful to determine which version of the text was preferred by the majority of the members of the Commission and to proceed on that basis.

14. Mr. FERRARI (Italy) said it should not necessarily be assumed that the originator of the message would be the offeror. If the party accepting an agreement was the originator of the message and requested the addressee to acknowledge receipt in a particular manner, that would amount to an attempt to modify the acceptance, which was not possible.

15. Ms. BOSS (United States of America) said that paragraph 7 was intended to solve that problem, by making it clear that article 12 did not deal with legal consequences such as offer and acceptance.

16. Mr. FERRARI (Italy) said that under the contract law of many countries, the acceptance could not contain a request for modification of the terms of the agreement, however minor.

17. Mr. MADRID (Spain) said that it was an unnecessary repetition, and a potential source of confusion, for article 12 to refer to the agreement between the parties; the latter was dealt with comprehensively in article 10, which was applicable to chapter III as a whole.

18. As to the substantive question at issue, a clear distinction must be made between the content of the message, which was a matter of contract law, and the requirements for acknowledgement of its receipt, which was only a technical matter, and in respect of which the Commission should try to find some middle ground in order to avoid giving all power to the originator.

19. Mr. PHUA (Singapore) said that the representative of Spain had clearly identified the problem faced by the Commission, namely that there was a distinction between acknowledgement of receipt and the legal concept of acceptance. That was the reason for the inclusion of paragraph 7 in the new draft. The determination of the legal consequences that might flow from the acknowledgement of receipt would have to be left either to whatever agreement had been reached between the parties as to the consequences of certain forms of acknowledgement or to the domestic laws of the country concerned, in which case paragraph 7 left the courts free to arrive at whatever conclusion they wished on the basis of the facts.

20. Mr. ABASCAL (Mexico) said that the reasons put forward for giving the originator the power to request an acknowledgement of receipt were still insufficient. In formulating trade law, it was necessary to observe what happened in practice and regulate that activity, and the law should be based on what was reasonable and customary, rather than on unusual cases. Paragraph 7 left matters in a vacuum, and did not meet the concerns expressed by the observer for Denmark and the representative of Italy.

21. Ms. BOSS (United States of America) said that there was no difference between the two versions of article 12 as far as the question of the empowerment of the originator to make unilateral requests was concerned. Only the new version attempted to make a distinction between the mere receipt of a message and the legal consequences that might flow from that message or the acknowledgement of its receipt. The role of agreements between the parties was not addressed in the old version but was taken up in the new version, which made it clear that the default rule in paragraph 2 did not apply where there had been an agreement to the contrary, and that in that regard the agreement was the same as a request. She urged the Commission to decide which version of article 12 it wished to work on so that it could take up the issue raised by the representative of Mexico.

22. Mr. ALLEN (United Kingdom) said that the new paragraph 2 dealt not with a case where there had been an agreement, but with a case where there had been no agreement; there was no reason in principle to treat such a case differently from a case in which the originator had not requested a particular form of acknowledgement. It was true that the implication of paragraph 2 was that where the originator had requested a particular form or a particular method of acknowledgement and that request was not complied with, the requirements of article 12 were not met. However, that was also true of the old paragraph 2, so that no change had been made.

23. His delegation would be content to consider the additional paragraph it had proposed at the previous meeting in order to address the concerns raised by the representative of Mexico and others.

24. Mr. GRIFFITH (Australia) said it seemed that the balance of opinion viewed the new draft as an improvement. The Commission should therefore take a decision on it.

25. His delegation did not feel that the inclusion of the second sentence of paragraph 5 was justified, since it was a derogation from the first sentence of that paragraph. There was no point in making a presumption, and immediately derogating from it.

26. Mr. FERRARI (Italy) said it was obvious that acknowledgement of receipt did not amount to acceptance. The problem was that if the originator unilaterally asked for an acknowledgement of receipt, there could be inconsistencies with contract law in many countries, since such a request could change or modify the acceptance.

27. Mr. SORIEUL (International Trade Law Branch) said that, on the question of the extent to which requesting acknowledgement of receipt might constitute a violation of contract law or a modification of an offer, the situation was much the same in paper-based communications. The problem lay in determining whether the form of the acknowledgement of receipt established by the originator of the message was binding in all cases on the recipient or whether an acknowledgement of receipt in another form was valid, whether there should be a general rule of invalidity and, if so, what the exceptions to such a rule should be.

28. Mr. FERRARI (Italy) said that he had referred only to the originator as acceptor because when the originator was the offeror, he was the master of the offer and could determine the form of the acknowledgement of receipt. There was a difference between asking the offeror to act by acknowledging receipt and sending registered mail with acknowledgement of receipt. In many cases, contract law had a mirror-image requirement; that meant that not even the slightest change could be made, and asking for an acknowledgement of receipt would constitute a change.

29. Mr. SCHNEIDER (Germany) said that both the problem and its solutions were clear; the Commission must make a decision. His delegation was in favour of the new version of article 12. It was true that the second sentence of paragraph 5 deviated from article 11, paragraph 5, but the problem lay in the fact that the Commission had not completed its consideration of article 11 and was therefore dealing with a specific problem before solving a general problem. The second sentence of paragraph 5 provided clarification, and his delegation was in favour of retaining it.

30. The CHAIRMAN suggested that, as there seemed to be a tendency to prefer the new version of article 12, the Commission should therefore work on that version.

31. Ms. BOSS (United States of America) said there seemed to be disagreement on whether the originator should have the power to ask that acknowledgement be made in a particular form. Article 12 did not address the issue; it merely provided

that in the absence of a request, certain rules applied. It could be argued that if there was such a request, the traditional contract rules came into play. The current wording of article 12 might therefore be the best solution in that it did not attempt to reconcile irreconcilable differences.

32. Mr. AL HERZ (Observer for Kuwait) asked whether there was a standing drafting committee of the Commission. If not, his delegation proposed that such a committee should be set up.

33. Mr. SORIEUL (International Trade Law Branch) said that the function of drafting committees was to align the different language versions of a text; such committees usually met when a draft was near completion. The Commission was still discussing the substance of article 12, and an informal working group could go much further than a drafting committee would be authorized to go. There was no standing committee for the drafting of texts.

34. Mr. ABASCAL (Mexico) said that since there was no agreement on the course to follow, the Commission should take up the text put forward by the representative of the United Kingdom, which was a compromise between the two positions. If it was not possible to reach a compromise on the basis of that text, the only solution would be to eliminate paragraph 2 altogether.

35. Mr. ZHANG Yuqing (China) said that the Commission had spent too much time on article 12, paragraph 2, and at that rate would not be able to complete its work. His delegation hoped that the draft put forward by the representative of the United Kingdom could be accepted. The Commission must solve the problem of paragraph 2 first and then take up the other paragraphs.

The meeting was suspended at 4.35 p.m. and resumed at 5.10 p.m.

36. The CHAIRMAN said that there appeared to be a clear preference for the new draft of article 12 and suggested the deletion of the words "requested or" in the first line of paragraph 2.

37. Mr. KOIDE (Japan), referring to article 12, paragraph 3, said that the phrase "the data message has no legal effect" was inappropriate, as it might lead to the misconception that receipt of acknowledgement in itself had some legal effect. That phrase should therefore be replaced by the similar wording used in paragraph 4 (b): "treat the data message as though it had never been transmitted".

38. Mr. FERRARI (Italy) said that his delegation supported the amendments suggested by the Chairman, as they were consistent with the contract law of all countries.

39. Mr. ABASCAL (Mexico) also agreed with the Chairman's suggestion.

40. Mr. BORMAN (United States of America) said that the Chairman's proposed change was an effective resolution and that the amendment suggested by the representative of Japan was useful in bringing the two provisions into conformity.

41. Mr. PHUA (Singapore) supported the proposed amendment to new article 12, paragraph 2.

42. Mr. CHOUKRI (Observer for Morocco) said that article 12 was not a fundamental article since it related solely to acknowledgement of receipt. Since the other cases were covered by other paragraphs, he saw no need to delete the words "requested or" in new paragraph 2. Furthermore, acknowledgement of receipt had nothing to do with offers and their acceptance, which was already covered by article 13. If there was an acknowledgement of receipt, such acknowledgement had no impact on the place or date of the contract already specified in article 14. Indeed, it was the originator who had the right to ask for acknowledgement of receipt and to specify the form it should take.

43. Mr. TELARANTA (Finland) said he agreed with the statements made by the representatives of Denmark and Germany.

44. The CHAIRMAN suggested that the amendments proposed by the representative of Japan concerning paragraph 3 should be adopted. She then asked why the phrase "such as those verifying the integrity of its contents" had been placed in square brackets in paragraph 6.

45. Mr. PHUA (Singapore) explained that the working group had included the bracketed phrase to clarify the term "applicable standards".

46. Mr. ABASCAL (Mexico) endorsed the suggestion made by the representative of Japan with respect to article 12, paragraph 3, and drew attention to the end of that paragraph, which read "until the acknowledgement is received". As far as he was aware, no decision had been taken as to whether it was the rule governing the acknowledgement of receipt or the rule governing the dispatch of acknowledgement of receipt that was the correct one. The end of paragraph 3 could very well read "until the acknowledgement is dispatched". If the originator was unilaterally setting conditions, it was logical to assume that the addressee would be released if he dispatched the acknowledgement. In his delegation's opinion, the rule governing dispatch was more logical than the rule governing receipt.

47. Mr. ALLEN (United Kingdom) said that his delegation could not agree to the proposal made by the representative of Japan. The situation reflected in paragraph 4 (b), where the key words were "upon notice to the addressee", was very different from that in paragraph 3, which made the originator's message conditional on receipt of an acknowledgement. In the latter case, the absence of an acknowledgement should automatically render the data message null and void. It should not be necessary for the originator to give notice to the effect that the data message was to be treated as though it had never been transmitted because he had already made his message conditional on receipt of an acknowledgement. It would make a nonsense of the provision to insert in paragraph 3 the words which appeared in paragraph 4 (b).

48. Some delegations would not accept the Chairman's amendment if the Commission did not add a further provision which would enable the originator to request an acknowledgement in a particular form and to insist that that form should be complied with. He therefore proposed the insertion of an additional

paragraph after paragraph 3 which would read "Where the originator has stated that the data message is conditional on receipt of an acknowledgement given in a particular form or by a particular method, the data message has no legal effect until an acknowledgement given in that form or by that method is received".

49. Mr. FERRARI (Italy) said that if article 12, paragraph 2, was amended as suggested by the Chairman to read "where the originator has not agreed with the addressee", article 12, paragraph 3, should be changed since its current wording appeared to give the originator the power to request an acknowledgement of receipt. It could be amended to read "Where it is stated that the data message is conditional on receipt of that acknowledgement, ...". The intention behind the Japanese proposal could be accommodated with the wording "the data message the reception of which has not been acknowledged is treated as though it had never been transmitted".

50. He agreed with the representative of Mexico that it had not yet been decided whether the acknowledgement was effected upon receipt or upon dispatch. There were other uniform law conventions drafted by UNCITRAL which were based on dispatch.

51. The United Kingdom proposal could be considered, since the spirit underlying it was similar to that underlying his delegation's proposal concerning article 12, paragraph 3.

52. Ms. BOSS (United States of America) said that her delegation endorsed the deletion of the words "requested or" in paragraph 2 and the idea of reconciling the provisions of paragraph 3 with those of paragraph 4. While the exact way in which those recommendations should be implemented had not yet been specified, it was apparent that consensus had been reached on those two points.

53. With regard to the Mexican representative's concerns relating to paragraph 3, most existing trading partner agreements used a receipt rule rather than a dispatch rule for determining legal effectiveness, and an attempt had been made to adopt that solution in the Model Law. The Mexican proposal would create inconsistencies within paragraph 3, which referred specifically to conditionality based on receipt and not on dispatch or acknowledgement. Her delegation favoured retaining the word "receipt" in paragraph 3 and did not support the proposal of the United Kingdom, which it believed to be inconsistent with the existing text of paragraphs 2 and 3.

54. Mr. LEBEDEV (Russian Federation) questioned the need to retain in the first paragraph a reference to the agreement between the originator of the message and the addressee.

55. Mr. ABASCAL (Mexico) thanked the representative of the United States of America for her explanation regarding paragraph 3 and said that he could now endorse paragraph 3 as drafted. The additional paragraph proposed by the United Kingdom would reopen the discussion which the deletion of the words "requested or" from paragraph 2 had sought to eliminate, namely, that the Model Law should not deal with the cases where an originator had required that acknowledgement should be given in a particular form. The assumption in paragraph 1 did not

refer to acknowledgement in any particular form and there was therefore no need to modify paragraph 2.

56. Mr. ALLEN (United Kingdom) explained that his delegation's proposal was not meant to supersede existing paragraph 3, but to follow it, either at the end of it or as an additional paragraph. If the originator was entitled to make his message conditional on receipt of an acknowledgement, then it should also be possible for the originator to make the message conditional on receipt of an acknowledgement in a particular form.

57. Mr. FERRARI (Italy) said that article 12, paragraph 3, whether amended as proposed by the representative of Japan or retained as drafted, was inconsistent with paragraph 7 of the same article, since paragraph 7 excluded the legal consequences of the acknowledgement of receipt.

58. Mr. MADRID (Spain) wondered whether, if the Commission decided to adopt the Chairman's proposal and delete the words "requested or" at the beginning of paragraph 2, it would be also be necessary to delete the reference to "request" at the end of paragraph 2. He favoured a receipt rule rather than a dispatch rule.

59. Mr. BURMAN (United States of America) supported the modification proposed by the representative of Spain and said he was encouraged to see that delegations had found a basis for compromise with regard to the final drafting of article 12.

60. The CHAIRMAN confirmed that the Commission had reached agreement with regard to article 12, paragraphs 1 and 2, and proposed that a small drafting group should address the apparent discrepancy between paragraph 3 and paragraph 7.

The meeting rose at 6 p.m.